IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 25018 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE DN PATEL

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MEHUL KISHORSINH JADEJA - Petitioner(s)
Versus
AMARJIT SINGH (IAS) APPELLATE AUTHORITY & & 2 - Respondent(s)

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Appearance :
MR IH SYED for the Petitioner.
MR SHALIN N MEHTA for Respondent No.2.
MR KL PANDYA, AGP for Respondent Nos.1 and 3.

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CORAM : HONOURABLE MR.JUSTICE DN PATEL

Date : 26/12/2006

ORAL JUDGMENT

Rule. Learned Assistant Government Pleader Mr.K.L.Pandya wavies service of notice of Rule on behalf of respondent Nos.1 and 3. Learned counsel Mr.Shalin Mehta waives service of notice of Rule on behalf of respondent No.2.

This petition has been preferred against the order dated 19th May,2006 passed by Authorisation Committee as well as against the order dated 21st July,2006 passed by Appellate Authority, which are at Annexures “E” and “G” respectively to the memo of the petition.

2. Learned counsel for the petitioner submitted that the present petitioner was examined by Muljibhai Patel Urological Hospital and report given by the Doctor, to the effect that the petitioner requires kidney transplantation. The kidney of the petitioner was not working properly and, therefore, the petitioner had applied to get kidney from one Vijaykumar Dilipbhai Choksi, who out of love and affection towards the petitioner is ready to donate the kidney to the petitioner and for that application has been preferred under section 9 of The Transplantation of Human Organs Act,1994 (hereinafter referred to as “the Act,1994”). It is stated by the learned counsel for the petitioner that

the Authorisation Committee constituted under the Act,1994 has not properly appreciated this fact and has dismissed the application vide order dated 19th May,2006. This order is patently dehors the provision of the Act,1994. The reasons advanced in the impugned order is that Vijaybhai is not a relative of the present petitioner and, therefore, application is refused. This application was preferred under section 9(3) of the Act,1994. A donor by the reason of affection or attachment towards the recipient or for any other special reason can donate his kidney to the petitioner. This fact has not been properly appreciated by the committee and extraneous reason has been given by the Committee and, therefore, the order passed 19th May,2006 passed by Authorisation Committee (Annexure “E” to the memo of the petition) deserves to be quashed and set aside.

3. Learned counsel for the petitioner further submitted that an Appeal was preferred under section 17 of the Act,1994 before the Appellate Authority. The appellate authority has not properly appreciated the provisions of the Act and wrongly approved the order passed by the Authorisation Committee. Opportunity of being heard was not given by the Appellate Authority to the petitioner and, therefore also, the orders passed by

both the authorities below deserves to be quashed and set aside. Learned counsel for the petitioner submitted that the impugned orders may be quashed the set aside and the matter may be remanded to the Authorisation Committee for afresh hearing under section section 9(3) of the Act,1994.

4. Learned counsel Mr.Shalin Mehta for respondent No.2 submitted that respondent No.2 is supporting the case of the present petitioner. It is stated that the application preferred under section 9(3) of the Act,1994, which ought to be in the statutory format and which must be joint application by donor and recipient of the kidney.

5. Learned counsel for respondent No.2 further submitted that in the facts of the present case, no such joint application has been preferred as envisaged under the Act,1994. Learned counsel for respondent No.2 has drawn attention of this Court on the judgement delivered by Hon'ble Supreme Court in the case of **Kuldeep Singh and another V/s. State of T.N. And others, reported in (2005)11 SCC 122** and especially para-14 thereof and has pointed out that the authorities below have to consider the income particulars for previous three final years and

their vocations. Though clear mandate has been given by the Hon'ble Supreme Court, none of the below authorities have appreciated these facts.

6. Learned Assistant Government Pleader Mr.K.L.Pandya on behalf of respondent Nos.1 and 3 submitted that there is no error whatsoever committed by the Authorisation Committee as well as by Appellate Authority. There is no blood relationship between donor and recipient, therefore, application preferred by the petitioner was not tenable at law. Therefore, the orders passed by both the authorities below may not be interfere by this Court. There is consistent findings of facts by this Court and, therefore, the petition may not be entertained by this Court.

7. Having heard the learned counsel for both the sides and looking to the facts and circumstances of the case, in my opinion, the order dated 19th May,2006 passed by Authorisation Committee as well as against the order dated 21st July,2006 passed by Appellate Authority, which are at Annexures “E” and “G” respectively to the memo of the petition, deserve to be quashed and set aside, mainly for the following facts and reasons:

(i) Section 9 of the Transplantation of Human Organs Act,1994, reads as under:

> ***9. Restrictions on removal and transplantation of human organs.-*** *(1) Save as otherwise provided in sub-section (3), no human organ removed from the body of a donor before his death shall be transplanted into a recipient unless the donor is a near relative of the recipient.*
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> *(2) Where any donor authorities the removal of any of his human organs after his death under sub-section (2) of section 3 or any person competent or empowered to give authority for the removal of any human organ from the body of any deceased person authorities such removal, the human organ may be removed and transplanted into the body of any recipient who may be in need of such human organ.*
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> *(3) If any donor authorities the removal of any of his human organs before his death under sub-section (12) of section 3 for transplantation into the body of such recipient, not being a near relative, as is specified by the donor by reason of affection or attachment towards the recipient or for any other special reasons, such human organ shall not be removed and transplanted without the prior approval of the Authorisation Committee.*
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> *(4) (a) The Central Government shall constitute, by Notification, one or more Authorisation Committees consisting of such members as may be nominated by the Central Government on such terms and conditions as may be specified in the notification for each of the Union territories for the*

purposes of this section.
(b) The State Government shall constitute, by Notification, one or more Authorisation Committees consisting of such members as may be nominated by the State Government on such terms and conditions as may be specified in the notification for the purposes of this section.

(5) On an application jointly made, in such manner as may be prescribed, by the donor and the recipient, the Authorisation Committee shall, after holding an inquiry and after satisfying itself that the applicants have complied with all the requirements of this Act and the rules made thereunder, grant to the applicants approval for the removal and transplantation of the human organ.

(6) If, after the inquiry and after giving an opportunity to the applicants of being heard, the Authorisation Committee is satisfied that the applicants have not complied with the requirements of this Act and the rules made thereunder, it shall, for reasons to be recorded in writing, reject the application for approval.

Looking to the provision of section 9 of the Act,1994, it appears that before Authorisation Committee is passing any order under sub-section (3) of section 9, an opportunity of being heard ought to be given to the petitioner. No such hearing has been given by Authorisation Committee, patently the order passed by Authorisation Committee is in breach of principle of natural justice. The order passed by the Authorisation

Committee is an arbitrary order. If an opportunity of being heard, would have been given to the petitioner, he could have, pointed out that there is misinterpretation of section 9 on the part of the Authorisation Committee. When arbitrariness is present, equality is always absent and when equality is present, arbitrariness is absent. Arbitrariness and equalities are sworn enemies of each other. Thus, the impugned order passed by Authorisation committee is deserves to be quashed and set aside.

(ii) Section 9(1) of the Act,1994 is applicable only, when donor of human organ is a near relative of recipient. Section 9(3) of the Act,1994 is applicable only, when donor of human organ is not a near relative of recipient, but is giving his human organ by the reason of affection or attachment towards the recipient or for any special reasons. Looking to the provision of section 9(3) of the Act,1994, it is specifically mentioned about if any donor by reason of affection or attachment towards the recipient or for any other special reasons, wishes to donate his kidney, such transplantation is permitted under law. These circumstances have never been checked by Authorisation Committee. Looking to the nature of order passed by Authorisation Committee, it has been mentioned that there is no emotional relationship between donor and recipient of the kidney. Still there are other grounds as

referred to in sub-section 3 of section 9 of the Act,1994, for which approval for removal and transplantation of human organ can be given by the Authorisation Committee. No reasons have been given by the Authorisation Committee in the impugned order for the rejection of the application for transplantation of the kidney under section 9(3) of the Act,1994. The reasons given by the petitioner has not been considered by the Authorisation Committee. Therefore also, the order passed by Authorisation Committee is also deserves to be quashed and set aside.

(iii) Learned counsel for the petitioner submitted that before Appellate Authority also, no hearing was given to the petitioner. Looking to the impugned order passed by the Appellate Authority, nothing has been referred in the order Whether the petitioner has been heard or not. The representation or the memo of the appeal has not been referred in the impugned order. Appellate Authority ought to have heard the petitioner personally. Personal hearing in such type of delegate matter is necessary. The Appellate Authority has failed to appreciate the facts and, therefore also, the order passed by Appellate Authority is in breach of principle of natural justice.

(iv) Appellate Authority has also misinterpreted section 9(3) of the Act,1994. Looking to the order passed by Authorisation committee as well as Appellate Authority, never any inquiry has been made by both the authorities. Casual and callous is the approach by both the authorities below. The care ought to have been taken by the authorities below before dismissing an application as well as appeal whether the ground referred in section 9(3) of the Act,1994 are ever present or not.

(v) Hon'ble Supreme Court held in the case of **Kuldeep Singh and another V/s. State of T.N. And others, reported in (2005)11 SCC 122**, especially para-14 thereof, reads as under:

> *"14. Since the object of the statute is to rule out commercial dealings, it would be desirable to require the donor and recipient to give details of their financial positions and vocations. It would be appropriate for the legislature to accordingly amend the Rules and Form 1, so that requirement for disclosing incomes and vocations for some previous financial years (say 3 years) get statutorily incorporated. This would help the Authorisation Committees to assess whether any commercial dealing is involved or not. Until legislative steps are taken, all the Authorisation Committees shall, in terms of this judgement require the applicants to furnish their income particulars for the previous three financial years and their*

> *<u>vocations</u>. The petitioners are directed to furnish the aforesaid details within ten days from today before the Authorisation Committee."*

From the aforesaid judgement, it is clear that both the authorities below have not check financial positions and vocations. Whenever the Apex Court is giving direction, it is meant for observance by Authorisation Committee as well as for the Appellate Committee. They must follow scrupulously direction given by the Apex Court so as to avoid multifariousness of the petitions. These authorities ought to read the judgement. It appears that they are not aware about this judgement. If the opportunity of being heard would have been given to the petitioner, this ignorance could have been avoided. Clear mandate has been given by the Hon'ble Supreme Court, over and above, which are given in section 9(3) of the Act,1994, which has not been followed by both the authorities below and their orders deserve to be quashed and set aside.

(vi) Learned counsel Mr.Shalin Mehta on behalf of respondent No.2 submitted that both the authorities have not properly appreciated the provisions of the Act,1994. It is alleged that there is no joint application by the donor and recipient. There is statutory format of an

application. As this Court is remanding the matter for its fresh decision before Authorisation Committee it shall consider this aspect over and above what is stated herein above.

8. As a cumulative effect of the aforesaid facts and circumstances of the case and judicial pronouncements, the impugned orders are hereby quashed and set aside. I hereby direct the Authorisation Committee to decide the application preferred by the petitioner within a period of two weeks from the date of receipt of the order of this Court. This petition is allowed. Rule made absolute. Direct service permitted.

(D.N.PATEL,J)

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